

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION Nos 3781, 5793
and 5993 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 - No

MOMIN OWNERS ASSOCIATION

Versus

AHMEDABAD MUNICIPAL CORPORATION

Appearance:

TANNA ASSOCIATES for Petitioners
MR PRASHANT G DESAI for Respondent No. 1
Ms AMY YAGNIK for Respondent No. 2 & 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 05/02/99

ORAL JUDGEMENT

The subject matter of these three petitions is the same land and in view of the fact that common questions of law and fact are involved, these three petitions are taken up for final hearing today with the consent of the learned counsel for the parties.

2. The petitions arise from the proceedings under the provisions of the Gujarat Prohibition of Transfer of

Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Area Act, 1991 (hereinafter referred to as "the Disturbed Area Act" or "the Act"). On account of the situation which had arisen in the State of Gujarat on account of the serious communal disturbances, the State legislature enacted the Disturbed Area Act with the object of safeguarding the interest of the owners and the maintenance of the properties in the disturbed areas against panic arising on account of the recurrence of riots.

FACTS

3. The subject matter of the present petitions is sale of land admeasuring 2617 (approx.) sq.mtrs. bearing city Survey Nos. 4214/B and 4215 to 4220 in Ward No. 2, Shahpur, Ahmedabad. The land was originally owned by three Parsi persons, namely, Gaurangi Manekshaw, Dhanjisha Edalji Anklesharia and Mani Edalji Anklesharia. The owners executed a power of attorney in favour of Manekshaw Edalji Anklessaria. The said power of attorney holder sold the land into separate parcels by executing separate sale deeds, registered with the Sub Registrar of Documents on 28.4.1995, in favour of the three petitioners which are non-trading Corporations, namely, Noor Owners Association, Sabina Owners Association and Momin Owners Association. The petitioners obtained permission for development of the said land and the Ahmedabad Municipal Corporation sanctioned the building plans and granted permission and also granted commencement certificate dated 16.12.1995 (Annexure "C"). The building plans provided for construction of 3 eight storied towers containing residential flats and it is stated that out of the three towers construction of two towers is already competed.

4. The petitioners received show cause notice dated 14.8.1995 (Annexure "I") from the Collector, Ahmedabad calling upon the Project Consultant, M.B. Enterprises (hereinafter referred to as "M.B. Enterprises") to show cause why action should not be taken for purchasing the lands in question without obtaining permission under the Disturbed Area Act and further intimating that no construction or transfer shall be effected without prior permission under the Disturbed Area Act. By order dated 18.9.1995 (Annexure II), the Collector issued an interim injunction restraining the Project Consultant, M.B. Enterprises from proceeding with the construction on the lands in question and fixing the hearing before the Collector on 21.9.1995. On that day, M.B. Enterprises

filed its reply dated 21.9.1995 (Annexure III) stating that no transfer with respect to the property under reference or any part thereof has been effected or will be effected in violation of the Disturbed Area Act. It was further stated that as and when the circumstances so require, they will arrange to take steps for compliance of the provisions of the Act. Protest was also made against the order of injunction. Thereafter, the Collector sent his communication dated 29.12.1995 (Annexure IV), informing the Municipal Commissioner that since the land in question was being transferred and the construction was being put up without obtaining permission under the Disturbed Area Act, no building permission may be granted in respect of the lands in question and that if at all any building permission was granted, the same may be cancelled immediately so that further transfer of the property can be prevented. M.B. Enterprises submitted a representation dated 15.1.1996 (Annexure V) to the Collector again stating that there was intention to transfer the property without obtaining any permission under the Act and that there was no basis for apprehending any disturbance in law and order situation. It was further submitted that the owners of the property had right to put up construction on the land. Ultimately, by order dated 24.4.1996, in exercise of the powers under Sections 4(2) and 5(1) of the Disturbed Area Act the Collector declared the transfer of the lands in question by the registered sale deeds as null and void as the lands in question were a part of the area which was declared as a Disturbed Area under the Act by a notification dated 29.10.1994. It was further observed in the Collector's order that the sale deeds were registered on the basis of permission bearing No. 1612 to 1623 dated 20.4.1995 but on scrutiny of the office record, the transferors had not made any application for permission to transfer the lands in question on 20.4.1995 nor was any such application granted on 20.4.1995 for the lands in question.

5. The aforesaid order of the Collector came to be challenged by the petitioners in Special Civil Application Nos. 3184 and 4276 of 1996. At the hearing of those petitions, the learned Government Pleader as well as the learned Counsel for the Ahmedabad Municipal Corporation agreed to withdraw the orders reserving liberty to take appropriate action in accordance with law. This Court accordingly granted liberty to the respondent-authorities to take action in accordance with law and also granted liberty to the petitioners to take up all contentions for resisting actions, if any, which may be taken by the authorities and to challenge such

proposed actions by means of appropriate proceedings, if permissible, in accordance with law.

6. In view of the above development, the Collector issued a fresh notice dated 19.9.1997 (Annexure "F") calling upon the petitioners to show cause why the transfer of the lands in question should not be declared as illegal as the lands were sold by the owners to the petitioners without prior permission under the Act. After hearing the petitioners, the Collector passed the impugned order dated 18.11.1997 (Annexure "G") declaring the transfers as null and void. Aggrieved by the said order the petitioners went in appeal before the State Government. By order dated 30.6.1998 (Annexure "I") the Additional Chief Secretary (Appeals) in the Revenue Department dismissed Appeal Nos. 1 to 3 of 1998 filed by the petitioners and confirmed the order of the Collector.

Aggrieved by the aforesaid orders, Momin Owners Association and Noor Owners Association have filed Special Civil Application Nos. 5793 of 1998 and 5993 of 1998 respectively. Sabina Owners Association has subsequently joined in these proceedings at their request. Since affidavit-in-reply on behalf of the Collector is filed in Special Civil Application No. 5993 of 1998, reference is made to the pleadings and documents on the record of the said petition.

7. In the meantime, during pendency of the above appeals, the Ahmedabad Municipal Corporation also passed order dated 3.4.1998 (Annexure D in Spl.C.A. 3781/98) cancelling the building permission on the basis of the Collector's order dated 18.11.1997. The said order dated 3.4.1998 is challenged in Special Civil Application No. 3781 of 1998 filed by Momin Owners Association.

8. Before proceeding to narrate the contentions urged on behalf of the petitioners, the findings recorded by both the authorities under the Disturbed Area Act may be enumerated :-

- (i) A perusal of the office record of the Office of the Collector indicated that no permission was granted by the Collector for transfer of land in question under the provisions of the Disturbed Area Act.
- (ii) Since the transferors were residing abroad, it was not possible to ascertain whether they had transferred the properties with their free consent.

(iii) In view of the opinion of the Deputy Town Planner, the price of the land in question, at the relevant time in April 1995, was about Rs.6500/- to Rs.7000/- per sq.mtr. The land was transferred at a price of Rs.3000/- per sq.mtr. and, therefore, the requirement under the Act that the transfer should be for fair market value was not shown to have been satisfied.

(iv) The adverse police opinion indicated that the lands were situated in a very sensitive area. If 132 residential flats are constructed and sold, the minority community in the area may become majority and the majority community may be rendered minority which would have a direct impact on the law and order situation and maintenance of public order. Hence, it was in public interest to maintain status quo. Since the object of the Act is maintenance of law and order and public order and to give protection to the persons residing in the disturbed area so that they do not leave the area, refusal of permission would be in consonance with the object of the Act.

(v) The Additional Chief Secretary rejected the plea for non interference on the ground that substantial investments were made in construction of the flats and a number of flats were already constructed and were also allotted by observing that object of the Act was likely to be frustrated by grant of permission.

CONTENTIONS ON BEHALF OF THE PETITIONERS

9. In all these three petitions, Momin Owners Association, Noor Owners Association and Sabina Owners Association have made a common cause for assailing the order dated 30.6.1998 of the Additional Chief Secretary, the Collector's order dated 19.11.1997 and the Municipal Commissioner's consequential order dated 3.4.1998, although there are some disputes amongst the parties inter se with which this Court is not concerned in these proceedings as they are subject matter of separate civil litigation.

10. On behalf of the petitioners, the learned counsel have submitted that although the permission was granted earlier on 20.4.1995, in view of the finding given by the

authorities that no such permission was granted, in these petitions under Article 226 of the Constitution, the petitioners are arguing on demurrer for challenging the orders of the Collector and the Additional Chief Secretary on merits in so far as the authorities have given finding on merits that it was not possible to give any declaration about free consent of the transferors and the finding about the value of the property. The learned counsel for the petitioners have submitted that they are not giving up the contention about genuineness of the permission dated 20.4.1995 but they are not making any submission on that basis in the present proceedings in order to obviate any delay which might be occasioned by any inquiry when the matter is still pending before the police authorities.

11. As far as the ground of fair consent is concerned, the learned counsel for the petitioners have submitted that Anklessaria family is a family of Parsis and at no point of time, the persons from the Parsi community had or have faced any threat or any situation which would require them to leave the area which was declared as a disturbed area earlier, but was not subjected to any riots in 1995. On the contrary, the Anklessaria family members had left India for going to the U.S.A. for better prospects and, therefore, they had disposed of their property and therefore, the transfers in question could never be said to be distress sales or panic sales. It is further submitted that the free consent is also clear from the affidavit dated 5.5.1998 (Annexure "M") of Dr. Anklessaria, Power of Attorney Holder of the transferors who are his family members.

12. As far as the ground of fair value is concerned, the learned counsel for the petitioners have submitted that the price at which properties were sold in the vicinity in the years 1991, 1992 and 1993 are set out in the statement at Annexure "L" - Pg. 71 to the petition) which show that the lands/properties were being sold at the rate between Rs.1000/- and Rs.2400/-. It is further submitted that these properties were comparatively smaller as the area of such properties was between 25 sq.mtrs. and 84 sq.mtrs. whereas the area of the property which is the subject matter of these petitions was much larger. It was further submitted that the Collector as well as the Additional Chief Secretary had relied upon the opinion of the Deputy Town Planner without giving the petitioners an opportunity to meet with the material on the basis of which the Deputy Town Planner had given such opinion and if such material had been disclosed to the petitioners, the petitioners would

have been able to satisfy the authorities that the opinion of the Deputy Town Planner was not justified and that the price at which the property was purchased by the petitioners was fair value of the property.

13. The learned counsel have also submitted that the authorities had no power or jurisdiction to take any other factor into consideration and that the so called law and order problem as per the opinion given by the Deputy Police Commissioner was not only baseless but also irrelevant. The learned counsel have placed strong reliance on the decision dated 26.2.1996 of this Court in the case of Padmaben Rasiklal Mehta vs. State of Gujarat (Special Civil Application No. 104/96).

SUBMISSIONS ON BEHALF OF AUTHORITIES

14. On the other hand, the learned counsel for the respondents have vehemently opposed the petitions and submitted that the petitions deserve to be dismissed as the Collector as well as the Additional Chief Secretary (Appeals) have taken into account all the relevant factors and have given findings on questions of fact which are not to be gone into by this Court in exercise of the jurisdiction under Article 226 of the Constitution. It is submitted that when there was no application of the transferors on record nor could the transferors be served with any notice of hearing of these proceedings, the authorities were justified in giving a finding that it was not possible to hold that the transfer was with free consent of the transferors.

15. As far the fixation of price is concerned, the learned AGP submitted that it was the administrative function for which the petitioners were not entitled to get an opportunity of being heard and, therefore, also no interference with the impugned orders is called for.

16. As far as the ground of maintenance of law and order and public order is concerned, the learned AGP reiterated the argument which had appealed to the Additional Chief Secretary that maintenance of law and order and public order were the primary objects of the Act and, therefore, also there was justification for not granting the permission in view of the opinion of the Deputy Police Commissioner. The learned AGP has invited the attention of the Court to the contents of the reply filed by Deputy Collector Mr JB Solanki including the averments that the Registrar, Inspection has filed a complaint against the petitioners in Karanj Police Station, being C.R. No. I-200/96 on 7.6.96 for the

alleged offences punishable under Secs. 420, 467, 468, 471 and Sec. 114 of I.P.C. as the petitioners had produced forged permission for registration of documents. (No chargesheet is as yet filed pursuant to the said complaint).

DISCUSSION

17. Having heard the learned counsel for the parties at length, this Court is of the view that the matter deserves to be remanded to the Collector for fresh inquiry in view of the findings given hereinafter.

18. One of the grounds which weighed with the Collector as well as the Additional Chief Secretary (Appeals) was the opinion of the Deputy Police Commissioner that construction and allotment of 132 flats on the land in question would affect the law and order and the public order in the area because minority would be converted into majority and majority would be reduced to a minority. This ground cannot at all be said to be relevant to the object of the Act. As held by this Court in the case of Padmaben Rasiklal Mehta (Supra) the object of the Act is to safeguard the interest of the owner and the occupant of the properties in the disturbed areas against panic sales on account of disturbances in the riot stricken area. Hence, the provisions of the Act particularly Section 4 thereof declares all transfers of immovable property situated in disturbed area null and void with effect from the date of such transfer but such declaration is subject to the provisions of sub-section (2) and (3) of Section 4. Clause (a) of sub-section (2) permits the transfer or transferee of the property to make an application to the Collector 'for a declaration that transfer of immovable property was made by free consent of the transferor or transferee and for a fair value of the immovable property in question.' This Court has specifically held that if the Collector finds in favour of the applicant in respect of the two factors i.e. free consent and fair value as consideration, it is not left to the Collector to inquire into any other issue. In view of the aforesaid categorical pronouncement of law by this Court, it must be held that the ground which weighed with the Collector and the Additional Chief Secretary on the basis of the opinion of the Deputy Police Commissioner was irrelevant and the said ground shall not at all be taken into consideration while hearing and deciding the matter afresh.

19. As far as the ground of free consent is concerned, it is true that since the transferors had left

the country and the address of the transferors was not made available to the authorities, the authorities were not in a position to ascertain from the transferors whether the transfers were with their free consent. The affidavit dated 5.5.1998 of Mr Anklessaria stating that the properties were transferred under free consent was not produced before the authorities. Since even the address of the members of the Anklessaria family nor of their power of attorney holder was disclosed before the authorities, the respondent-authorities cannot be blamed for not recording free consent of the transferors in favour of the petitioners. The learned counsel for the petitioners have now given the address of the transferors and their power of attorney holder as under :-

Dr. Anklesharia Manekshaw Adalji,
4128 - East 62, Street (Tulsa),
Oklahoma 74136
U.S.A.

It is, therefore, necessary in the interest of justice to direct the Collector to ascertain the views of the transferors/power of attorney holder of the transferors at the above address during the course of the fresh inquiry.

20. As far as the ground of fair value of the property is concerned, the learned counsel for the petitioners appear to be on firmer ground. Whether the price of about Rs.3000/per sq.mtr. at which the property was purchased by the petitioners can be said to be a fair market value or not would certainly be a question of fact, but reliance placed by the authorities on the opinion of the Deputy Town Planner cannot tilt the scale against the petitioners without giving the petitioners an opportunity to show that the instances on which the Deputy Town Planner might have relied upon for the purpose of giving his opinion might be in respect of properties which may not be similar to the properties in question from the view point of location, area, size and other relevant factors. The circumstances under which the properties have been sold by the transferors would also be a relevant consideration. In fact, the provisions of the Act requiring the Collector to hold inquiry into the question whether the property is sold for a fair value or not were intended to be a part of the inquiry into the larger question whether the property was transferred by free consent of the transferors. Hence, if on the basis of the other material, it can be shown to the authorities that the transferors had transferred the

property with free consent, the inquiry into the question about fair value of the property is not to be held in golden scales and the inquiry is not to be held with the perspective of the authorities determining market value of the properties under the Stamp Act. Of course, if the property is transferred at a throw away price, that may be indicative of absence of free consent of the transferors but nonetheless the main issue is assessment of free consent of the transferors and the question of fair value of the property is to be gone into only as a subsidiary question for the purpose of deciding the primary question about free consent of the transferor. Here also, while ascertaining free consent of the transferors, the authorities are not precluded from holding an inquiry into the question whether consideration had actually passed from the transferee/s to the transferor/s.

21. Since the Collector as well as the Additional Chief Secretary misdirected themselves in law in not applying the provisions of Section 4 of the Act in light of the principles enumerated by this Court in the case of Padmaben Rasiklal Mehta (Special Civil Application No. 104/96 decided on 26.2.1996) and in this judgment, the impugned orders deserve to be quashed and set aside with liberty to the Collector to proceed further in the matter after giving the petitioners a copy of the report of the Deputy Town Planner alongwith the particulars of the material on the basis of which the Deputy Town Planner had given the aforesaid opinion. It will also be open to the petitioners to represent their case and to produce the material in support of their case.

22. Since the impugned order dated 3.4.1998 passed by the Ahmedabad Municipal Corporation cancelling the building permission was based solely on the impugned order dated 18.11.1997 of the Collector which is being set aside by this order, the Ahmedabad Municipal Corporation shall pass appropriate orders on basis of the order which may be passed by the Collector after inquiry pursuant to this order of remand. In case the order of the Collector after such inquiry is in favour of the petitioners, the Ahmedabad Municipal Corporation shall restore the building permission within one month from the date of receipt of the order of the Collector.

ORDER

23. In the result, the petitions are partly allowed. The order dated 30.6.1998 of the State Government in appeal (Annexure "I") and the order dated 19.11.1997 of

the Collector (Annexure "G") are quashed and set aside and the matter is remanded to the Collector, Ahmedabad for holding fresh inquiry in light of the principles laid down in this judgment.

24. In the facts and circumstances of the case and particularly in view of the fact that substantial construction has already been put up on the land in question, it would be in the interest of justice to direct the Collector to hold and complete the inquiry as expeditiously as possible and in any case within three months from the date of receipt of a certified copy of this order. This direction is given in view of the assurance given by the learned counsel for the parties that their respective clients will cooperate with the Collector for expeditious completion of the inquiry.

Sd/-

February 5, 1999 (M.S. Shah, J.)

sundar/-